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In The

Supreme Court of the United States

October Term, 1995

UNITED STATES DEPARTMENT OF INTERIOR, ET AL.,

Petitioners,

v.

STATE OF SOUTH DAKOTA AND CITY OF OACOMA,

Respondents.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF *AMICI CURIAE* OF THE CHEROKEE NATION OF OKLAHOMA, CHIPPEWA-CREE TRIBE OF THE ROCKY BOY'S RESERVATION, KENAITZE INDIAN TRIBE, MASHANTUCKET PEQUOT TRIBE, NATIONAL CONGRESS OF AMERICAN INDIANS, OGLALA SIOUX TRIBE, PAIUTE TRIBE OF UTAH, PRAIRIE ISLAND INDIAN COMMUNITY, ROSEBUD SIOUX TRIBE, SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA, SEMINOLE NATION OF OKLAHOMA IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

The Eighth Circuit found Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, which allows the Secretary of the Interior to take land into trust for Indians, to be an unconstitutional delegation of legislative authority. According to the Eighth Circuit's ruling, the Secretary has, for 60 years, been acting illegally in taking millions of acres of land into trust under § 465. Hence, in the Eighth Circuit, he could be precluded from taking any more land in trust. Furthermore, land already taken into trust could lose that status and become vulnerable to state and county taxation. If tribes or individuals were unable to pay their taxes – a very real possibility for many Indians who are just beginning to climb out of poverty – their lands could be quickly lost to foreclosure. Also, without trust status, it is possible that Indian lands could be lost through improvident sales or transfers. Finally, without trust status, the balance of tribal-state jurisdiction would be disturbed.

Amici Curiae are 10 federally recognized tribes and one national Indian organization. All *amici* tribes have had land taken into trust, have applications pending to do so, or may wish to file such petitions in the future. While not all *amici* reside within the jurisdiction of the Eighth Circuit, all are adversely affected by the precedent set by the decision. Although this case began as a dispute over a mere 91 acres of land, the ruling could potentially affect millions of acres of land and hundreds of tribes throughout the United States. Therefore, *amici* have a

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[1] Counsel for Petitioners and Counsel for Respondents have consented to the filing of the brief of *amici*. The consents are submitted for filing herewith.

substantial interest in having the United States Supreme Court review and reverse this devastating decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the Lower Brule Sioux Tribe purchased 91 acres of land in fee and requested the Secretary of the Interior to take that land in trust, pursuant to 25 U.S.C. § 465. The Secretary placed the land in trust and the State of South Dakota and City of Oacoma challenged that action on a variety of statutory and constitutional grounds.

The United States District Court for the District of South Dakota found that the United States had not waived its sovereign immunity with respect to the statutory claims and dismissed those claims for lack of jurisdiction. The court then rejected the constitutional claim. Ignoring the statutory claims, the Court of Appeals for the Eighth Circuit reversed the District Court's decision on the constitutional claim. Effectively gutting federal policy, the Eighth Circuit found that § 465 – the section authorizing the Secretary to take the land of the Lower Brule Sioux Tribe into trust – was an unconstitutional delegation of legislative authority.

Amici urge this Court to grant the United States' Petition for a *Writ of Certiorari* because of the extreme importance of this case and because the decision of the Eighth Circuit conflicts with Supreme Court precedent. The Eighth Circuit's decision frustrates the federal policy of promoting self-determination for Indian tribes through the acquisition of trust land. In reaching this decision, the Court of Appeals disregarded fundamental principles of judicial restraint established by this Court to avoid reaching constitutional issues

unless absolutely necessary. Also, the Court of Appeals ignored this Court's clear precedent on the non-delegation doctrine. In this regard, the court refused any attempt to construe § 465 so as to preserve its constitutionality; failed to understand that Congress fulfilled its legislative role by declaring policy; ignored all pertinent legislative history demonstrating Congress' intent in passing the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 and all regulations pointing to limitations on the delegation; and failed to properly consider the relevance of judicial review to the issue of constitutionality.

ARGUMENT

I. THIS CASE MERITS REVIEW BECAUSE THE EIGHTH CIRCUIT EVISCERATES A FUNDAMENTAL AND LONGSTANDING FEDERAL INDIAN POLICY OF MONUMENTAL IMPORTANCE TO THE WELFARE OF INDIAN PEOPLE

For centuries Indian tribes and Indian people have struggled to protect their land. Since first European contact they have been in conflict with states and European settlers seeking to take over Indian land. It has been a constant and hard fought battle to stave off this encroachment – a battle more often than not lost. Fortunately for Tribes, the United States today has a strong policy to increase and protect the Indian land base. The cornerstone of that policy is § 465 of the Indian Reorganization Act of 1934. 25 U.S.C. § 465 (1992). This statute, the only statute of its kind, allows the Secretary of the Interior to take land into trust for Indians. With the protection of trust status, the federal policy of promoting Indian

self-determination and self-sufficiency can be realized.[2] As history has shown however, without such protection, massive losses of Indian land and the very viability of Indian people are threatened.

From late in the nineteenth century until 1934, Congress experimented with a policy whereby it ceased to protect Indian land. This policy is known as allotment. *See* The General Allotment Act of 1887, 25 U.S.C. §§ 331 et. seq. The goal of allotment was to break up reservations and to apportion land to individual Indians to encourage their adoption of an agrarian lifestyle and assimilation into general American society. *See* Felix S. Cohen, Handbook of Federal Indian Law, 131-32 (1982 ed.).

Allotment was an abysmal failure. Because of that policy Indian people found themselves dispossessed of more than 90,000,000 acres of their land. *Cohen* at 138 (*citing* Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73rd Cong., 2d Sess. 428-89 (1934)). As a result, Indian people suffered a "lamentable lowering of the[ir] social and economic status." 78 Cong. Rec. H11,725 (daily ed. June 15, 1934) (statement of Rep. Howard). As described in the *Meriam Report*[3], the overwhelming majority of Indian

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[2] *See* President Clinton, Address at Tribal Leaders Event (April 29, 1994), *reprinted in*, Bureau of Indian Affairs, U.S. Dep't of Interior, Bureau of Indian Affairs, vol. 18, no. 4 (1994) (stating that the United States is committed to a policy of self-determination for Indian tribes).

[3] Institute for Government Research, *The Problem of Indian Administration* (L. Meriam ed.) (Baltimore: The Johns Hopkins Press, 1928) (*Meriam Report*).

people were pauperized by allotment. Living in destitution, Indian people suffered some of the highest malnutrition and mortality rates, and the lowest levels of education and standard of living of any group in the United States. *See generally, Meriam Report.*

Admitting the terrible error of allotment, Congress ended that policy through the Indian Reorganization Act of 1934. 25 U.S.C. §§ 461-479. Learning a lesson from the allotment era, Congress recognized that there was a significant nexus between a sufficient land base and the economic and cultural survival of Indian tribes. Indians "have to have lands, or they will be paupers. . . . " 78 Cong. Rec. S11,135 (daily ed. June 12, 1934) (Statement of Sen. Wheeler). In order to provide Indians with an opportunity for survival, Congress made one of the central objectives of the IRA to reverse the land dispossession.

First, Congress stopped all further allotment. 25 U.S.C. § 461. Second, it extended indefinitely the trust period for allotted lands. 25 U.S.C. § 462. Then, it authorized the Secretary of the Interior to restore to tribal ownership any reservation lands that had not been allotted, and limited the sale or transfer of Indian land. 25 U.S.C. §§ 463-464. Finally, Congress enacted the provision at issue here "for the purpose of providing land for Indians." 25 U.S.C. § 465. This section is the only section which actually attempts to "undo the dramatic effects of the allotment years." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992).

Pursuant to § 465, the Secretary of the Interior has, for sixty years, taken millions of acres of land into trust for the benefit of Indians. The Eighth Circuit's ruling jeopardizes these acquisitions and threatens future trust acquisitions, thereby seriously impairing the federal government's entire policy of promoting Indian self-determination through land acquisition – an almost inviolate Congressional province. This Court "has never held unconstitutional an action by which Congress or the Executive has recognized or established Indian Country." *Cohen* at 42. *See, e.g., United States v. John*, 437 U.S. 634 (1978); *United States v. McGowan*, 302 U.S. 535 (1938).

If this infringement on federal policy is allowed to stand, the consequences will be disastrous. With a strong federal policy of protecting Indian land again in place, Indian tribes and Indian people have hope of strengthening their governments and developing their economies, which will, in turn, allow them to provide for themselves and their people and will allow their cultures to thrive. If the Eighth Circuit's decision is allowed to stand, however, the Secretary will lose power to take land in trust in the future and may be helpless to protect land already acquired under § 465 – whose trust status is likely to be questioned. If trust status is lost or if future acquisitions are prevented from being taken into trust, Indian land might be subject to alienation without Congressional approval[4], which could lead to overreaching by unscrupulous buyers and improvident losses of massive tracts

[4] Congress has always sought to protect Indian land against improvident alienation. *See* The Non-Intercourse Act, 25 U.S.C. § 177 (1834).

of land. Likewise, without trust status, the land could be subject to taxation – which, as Justice Marshall observed, "involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

Furthermore, tribal and state regulatory and adjudicatory jurisdiction over such land could be called into question. Trust status is a crucial factor in this Court's resolution of tribal-state disputes over jurisdiction. *See, e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556-57 (1832) (finding generally that Indian territory is territory over which the Indian nations have exclusive authority); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (finding that § 465 explicitly exempts land taken into trust from state taxation); *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505 (1991) (finding that where land is validly set apart for Indians, Indian activities arising on that land are exempt from state taxation); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (finding that tribe had authority to tax mining activities on tribal trust land).

The very importance of this case to federal Indian policy and to tribes and Indian people calls for this Court's review.

II. BY PREMATURELY PASSING ON THE CONSTITUTIONALITY OF § 465 THE EIGHTH CIRCUIT VIOLATED ONE OF THIS COURT'S MOST FUNDAMENTAL RULES OF JUDICIAL RESTRAINT

The doctrine of judicial restraint is well-established under Supreme Court precedent. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass

on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1988). Consequently, where a case involves both constitutional and non-constitutional issues, a federal court must first consider potential non-constitutional grounds for its decision. *Jean v. Nelson*, 472 U.S. 846, 854 (1985).

Here, both statutory and constitutional issues were presented to the Eighth Circuit for review. The statutory claims included: whether sovereign immunity under the Quiet Title Act, 28 U.S.C. § 2409a, prohibited review of the Secretary's decision to take land into trust where that decision was challenged under the Administrative Procedure Act, 5 U.S.C. § 702; and whether sovereign immunity insulated the Secretary if he exceeded his authority in taking the land into trust. The constitutional issue was whether § 465 provided sufficient standards to constitute a lawful delegation of authority to the Secretary.

In blatant disregard of judicial restraint, the Eighth Circuit prematurely reached the constitutional question. The court stated:

> We doubt whether the QTA precludes APA review of agency action by which the United States acquires title. But given our conclusion that § 465 is an unconstitutional delegation of power, we need not decide this issue.

State of South Dakota and City of Oacoma v. United States Dep't of Interior, 69 F.3d 878, 881 n.1 (8th Cir. 1995), *App.*, 4a n.1.

Had the Eighth Circuit exercised proper judicial restraint, it would have first considered the jurisdictional or statutory arguments under the Quiet Title Act or

Administrative Procedure Act. Because the answers to these inquiries could have been dispositive,[5] it may have been unnecessary for the court to reach the constitutional question.

Additionally, in its haste to rule on the constitutional issue, the Eighth Circuit failed to recognize that under Fed.R.Civ.P. 19, it could and should have dismissed this case for lack of an indispensable party – the Lower Brule Sioux Tribe.[6] Given the gravity of the case to the Tribe and the court's duty to refrain from a constitutional ruling, the Eighth Circuit should have taken the steps necessary to protect the absent Tribe and considered the issue of the Tribe's joinder before reaching the constitutional issue. *Provident Tradesmens Bank*, 390 U.S. at 111 (finding that a Court of Appeals has an independent duty to protect the interests of absent parties).

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[5] The court could have concluded that the Secretary exceeded his power to take land in trust, that the decision was made without compliance with regulations, or that the decision was arbitrary and capricious, as the state initially charged.

[6] Rule 19 establishes a two prong test for determining whether a party is indispensable to a suit. Under the first prong, the court must determine whether a party is necessary. The court must then analyze under the second prong whether the facts and circumstances of the case demonstrate that a party is indispensable and in "equity and good conscience" the suit should be dismissed. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108 (1968).

The Tribe here is a necessary party due to its vested interest in the subject of this suit in that the subject of the suit is the disposition of its land. Also, the Tribe is indispensable due to the extreme prejudice to its interests caused by this suit. Because the Tribe is immune from suit, it cannot be joined and hence the suit should have been dismissed.

III. IN DECIDING THE CONSTITUTIONAL ISSUE THE EIGHTH CIRCUIT BLATANTLY DISREGARDED SUPREME COURT PRECEDENT REGARDING THE NON-DELEGATION DOCTRINE

A. In Direct Contravention Of Supreme Court Precedent, The Eighth Circuit Failed To Try To Preserve The Constitutionality Of § 465

Under the United States Constitution, Congress may not constitutionally delegate its legislative powers to another branch of the government. U.S. Const. art. I, § 8, cl. 3. This constitutional doctrine is known as the non-delegation doctrine. While under this doctrine, courts may, and have, struck down congressional statutes as unconstitutional, those instances are extraordinarily rare. Only twice in this Court's history, and not since 1935, has this Court found a statute unconstitutional under the non-delegation doctrine. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). Rather, in keeping with the general principle that courts should strive to construe statutes so as to preserve their constitutionality, *see Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988), this Court has found that the non-delegation doctrine should be employed as a canon of construction rather than a means by which to strike down acts of Congress. In this regard the Court has stated that:

> In recent years, our application of the non-delegation doctrine principally has been limited to the interpretation of statutory texts, and more particularly, to giving narrow constructions to

> statutory delegations that might otherwise be thought to be unconstitutional.

Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989).

In contravention of the Supreme Court's trend, however, the Eighth Circuit gave a wildly broad construction to § 465 – asserting, for example, that the section allows the Secretary to "purchase the Empire State Building in trust for a tribal chieftain as a wedding present" – and thus found § 465 to be unconstitutional. *South Dakota* 69 F.3d at 882, *App.*, 7a.

B. The Eighth Circuit Failed To Understand That Where Congress Has Performed Its Fundamental Legislative Function Of Determining Policy, Delegation Of The Details To A Coordinate Branch Is Constitutionally Permissible

Where Congress has performed its fundamental legislative function of determining legislative policy, under the necessary and proper clause, delegation of the details to a coordinate branch is constitutionally permissible. *Lichter v. United States*, 334 U.S. 742, 778 (1948); *Yakus v. United States*, 321 U.S. 414, 424 (1944). Otherwise, "the legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation." *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).[7]

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[7] Under this principle, even extremely broad delegations have been upheld by this Court. For example, in *Touby v. United States*, 500 U.S. 160 (1991), Congress delegated authority to the

Here, in accordance with constitutional law, Congress has established the law and policy behind the IRA and § 465. In fact, it would be hard to find a more carefully considered congressional determination of legislative policy than that surrounding the passage of the IRA. The context in which the IRA was passed and the legislative history surrounding that Act clearly demonstrate that Congress specifically enacted § 465 to return land and viability to the Indian people after the failed policy of allotment. *See* Section C, *infra*.

Furthermore, the delegation here is exactly the type envisioned by the necessary and proper clause. U.S. Const. art. I, § 8. In this case, it would have been extremely impractical for Congress to specify each acre of land to be taken into trust under its land acquisition policy. With over 500 federally recognized tribes and possibly millions of acres of land at stake, the burden on

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Attorney General to designate drugs as controlled substances with the only limitation being that they must pose an "imminent hazard" to the public safety. 500 U.S. 160 (1991). Likewise, in *Yakus v. United States*, 321 U.S. 414, 424 (1944), the Court upheld a broad delegation of authority to the price administrator to fix prices where the discretion was guided only by the broad standard that such prices must be "generally fair and equitable."

Congress to specify each parcel would have been oppressive.[8]

C. The Eighth Circuit Failed To Properly Consider The Legislative History

In determining whether a statute constitutes an unconstitutional delegation of legislative power, the statutory standards "derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946). As demonstrated in *Mistretta*, a statute's legislative history can often be the instrument which provides that "factual background and statutory context." 488 U.S. at 376 n.10 (1989). *See also Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 593 (1985). Instead of using the limitations enunciated in the legislative history, however, the Eighth Circuit here improperly considered only the "four corners of the statutory language" in its analysis. *South Dakota*, 69 F.3d at 885.

Here, the legislative history of the IRA demonstrates that Congress did establish law and policy, enacting § 465 in order to "reverse the effects of the Indians' loss of land under the allotment policy and to help Indians become more sufficient, both economically and otherwise." H.R.

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[8] Unless the Eighth Circuit's decision is reversed, however, tribes will be forced to go to Congress to have land taken into trust. Such a result will needlessly bog down the Congressional process in direct opposition to Congress' intent that it not be forced to make such detailed decisions in order to implement its Indian policy.

Rep. No. 1804, 73rd Cong., 2d Sess. 1 (1934). This Court has itself found that the legislative history clearly demonstrates that the intent of Congress in passing the IRA was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe*, 411 U.S. at 152 (1973) (*quoting*, H.R. Rep. No. 1804, 73rd Cong., 2d Sess. 1 (1934)). *See also, Morton v. Mancari*, 417 U.S. 535, 542 (1974) (finding that the overriding purpose of the IRA was "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.").

D. The Eighth Circuit Likewise Failed To Consider The Regulations Adopted By The Secretary Pursuant To § 465 As Providing Meaningful Standards

The policy and practice of the Secretary in applying the statute provides an important interpretive framework to adjudge whether the statute possesses appropriate boundaries. Courts often look to the regulations drafted by the federal agency charged with implementing the statute when evaluating whether constitutionally required limitations on discretion exist. *See, e.g., Yakus*, 321 U.S. at 426 (the restrictions articulated in the Administrations "statement of consideration" informed Court's decision that statute was not constitutionally infirm). In this present action, the regulations promulgated by the Secretary to govern the acquisition of land under § 465 provide detailed standards governing the exercise of discretion. For example, the regulations delimit what land the Secretary is permitted to take in trust, 25 C.F.R.

§ 151.3(a)-(b), and specify factors for the Secretary to consider in evaluating whether to take a parcel of land into trust. 25 C.F.R. § 151.10. The regulations even provide procedures to flush out possible state and local challenges to trust acquisitions. 25 C.F.R. §§ 151.10, 151.11 (60 Fed. Reg. 32,879, June 23, 1995). Finally, new regulations now clearly provide for an opportunity for judicial review. 61 Fed. Reg. 18,082 (1996).

E. The Eighth Circuit Failed To Properly Consider The Availability Of Judicial Review In Upholding A Statute Against A Non-Delegation Challenge

This Court has indicated that the availability of judicial review is a relevant consideration when reviewing the constitutionality of a statute under the non-delegation doctrine. *See, e.g., Skinner v. Mid-America Pipeline*, 490 U.S. 212 (1989) (*citing, American Power & Light Co., v. SEC*, 329 U.S. 90 (1946)). The Eighth Circuit purported to recognize this principle, stating that "[j]udicial review is a factor weighing in favor of upholding a statute against a non-delegation challenge." *South Dakota*, 69 F.3d at 882, *App.*, 6a.

Despite this explicit acknowledgment, however, the Eighth Circuit failed to analyze whether the Secretary's decision under § 465 was subject to judicial review.[9] This

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[9] Instead, without analysis, the Eighth Circuit merely invoked statements made to the district court by the United States that such review was not available. *See, e.g., South Dakota* 69 F.3d at 880, 884. Such reliance on mere statements is not adequate. First, this Court has admonished courts not to issue

failure is particularly significant now in light of the recently enacted regulations which clarify that there is judicial review of Secretarial decisions under § 465. 61 Fed. Reg. 18,082. *See Jean v. Nelson*, 472 U.S. 846, 854 (1985) (holding by implication that regulations promulgated pending review may influence statutory interpretation on appeal).

rulings based on statements and opinions, particularly where doing so raises constitutional questions. *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Second, because the issue of judicial review is a legal question, the Eighth Circuit's review was de novo. *See United States v. Bell*, 5 F.3d 64, 68 (4th Cir. 1993). Under this standard, the court should have made a fresh, independent determination of the issue of judicial review.

CONCLUSION

For the reasons stated above, the United States' Petition for a Writ of Certiorari should be granted by this Court.

Dated this 3rd day of July, 1996

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